United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1436

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

GREENE BERRY MULLENS,

Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF OF APPELLEE

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STATUTES.

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BRIEF OF APPELLEE

Preliminary Statement

This case was previously before this Court on the government's appeal of a certain Decision & Order of Hon. John T. Curtin wherein he suppressed $10,410 in counterfeit $10 and $20 Federal Reserve Notes found in the home and in the possession of the appellant's mother as a result of a search conducted pursuant to warrant, finding that probable cause for the issuance of the warrant was lacking. This Court affirmed his opinion. Docket No. 74-2479. The Government then petitioned for a rehearing which was denied on March 27, 1975.

That appeal was occasioned by the Judge's bifurcated decision wherein he left remaining to be decided (14-A, 17-A)[1] the admissiblity of the following:

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[1] Reference to Appendix.

1. A certain oral admission made by Mullens at Buffalo Police Headquarters;

2. Aluminum plates used in the counterfeiting taken from 25 Wakefield Avenue, Buffalo, New York;

3. A printing press and other counterfeiting paraphernalia seized at 1361 Fillmore Avenue, Buffalo, New York; and

4. Mullens' signed confession at the United States Secret Service Office.

By Decision & Order dated October 9, 1975 (15-A-21-A) Judge Curtin ruled the above items admissible. Subsequent thereto and on October 29, 1975, Mullens entered a plea of guilty to the first count of the indictment (4-A-5-A), charging him with a violation of Title 18, United States Code, Section 471, reserving his right to challenge the Decision & Order of October 9, 1975. On December 1, 1975 he was sentenced to the custody of the Attorney General for a period of four years. He then timely filed his Notice of Appeal.

Statement of Facts

Judge Curtin's findings of fact (8A-11A, 17A-19A) are amply supported by the testimony of government witnesses at a suppression hearing held May 14, 1974. The record clearly shows that when Det/Sgt. James Hunter and other Buffalo Police Officers arrived at the Mullens family home about 10:30 or 11:00 a.m. on December 7, 1973, they searched the premises and found the suppressed counterfeit money in the possession of the defendant's mother. Mr. & Mrs. Mullens, known by Det. Hunter for some twenty years, were then detained and taken down to Buffalo Police Headquarters, arriving there sometime around 12:30 p.m. (11-15, 96).[2] Then, sometime between 1:00 and 2:00 o'clock in the afternoon the

[2] Reference to Transcript of Suppression Hearing held May 14, 1974.

defendant, Greene Berry Mullens, appeared at Buffalo Police Headquarters (18).

As to how Mullens came to appear at Buffalo Police Headquarters at that time, Det/Sgt. Hunter testified that the defendant's cousin, a police cadet, came into his office and asked why the Mullens family was there. Hunter advised him that they were being questioned regarding counterfeit currency and that he was looking for his cousin, the defendant. The Cadet told Hunter that he believed he could contact Mullens; that he did get in contact with Mullens and that Mullens was willing to come to the station house but that he wanted the Police Cadet to pick him up. The Cadet then took an unmarked police vehicle, picked up Mullens and returned to Headquarters with him, arriving there at about 1:30 or 2:00 p.m. (17-18).

As soon as Mullens arrived he said I am the one who "did it". Mullens immediately continued, "Let my parents go, they didn't know anything about it. They don't have anything to do with this. I will take the weight." (18, 53-54). Hunter then testified that he immediately "had to shut him up so that I could read him his rights." (54). Then after Hunter advised Mullens of his *Miranda* rights, both orally and in writing (Gov. Ex. 3), Mullens said he understood but was willing to waive them. He then admitted his role in the counterfeiting scheme and consented to a search of 1361 Fillmore Avenue (29-30, 98, Gov. Ex. 4).

While Secret Service Agent Samuel J. Zona then told Mullens that no one else, including his parents, would be charged if he cooperated, he also said that Mullens was the one that was "doing all the dealing, I just agreed with him. He is the one that brought it all up." (119).

Shortly after the consent to search was executed, about 3:00 p.m. (53), Mullens, Hunter and Zona got into a government

vehicle to proceed to the Fillmore Avenue address and, Zona testified he was surprised when he heard Mullens say: "We have got to go to Wakefield Street first." (101). There, Mullens and Hunter went into the house; Mullens went into an apartment therein and returned with a newspaper under his arm; Mullens handed the paper to Hunter and told him, "That is the plates." (22, 102). As Det. Hunter testified, "It was his suggestion and his cooperation to take us." (21).

From there, Mullens directed Hunter and Zona to the Fillmore Avenue address, telling them to "stop here, this is where the press is." (24). Hunter and Zona then followed Mullens in and Mullens showed them where he had burned some money in the basement and some in the rear of the house (25). Mullens then took Hunter and Zona upstairs, took out his key and opened the door (27-28).

The three of them then went to Secret Service Headquarters in Downtown Buffalo, New York, arriving there at approximately 5:00 p.m. (104). Between the time the three of them left Buffalo Police Headquarters and arrived at the Secret Service Office, in addition to taking them to both the premises and pointing out the various counterfeiting paraphernalia, Mullens volunteered additional information regarding his involvement (101-103).

Upon arrival at Secret Service Headquarters, Zona again orally advised Mullens of his rights pursuant to *Miranda* and then handed him the Advice of Rights Form (Gov. Ex. 9). After stating that he had read the form and understood his rights, he signed it and stated that he was willing to give a statement. A short time thereafter Mullens gave a detailed written confession (105-108, Gov. Ex. 10).

ARGUMENT

Judge Curtin's determination that the evidence was not tainted nor obtained by coercion was proper and should not be disturbed by this Court on appeal.

As previously indicated, Judge Curtin's findings are fully supported by the evidence adduced at the suppression hearing and his conclusions of law are proper. To quote from the oft-cited case of *United States v. Johnson,* 327 U.S. 106, 112, where "it does not clearly appear that the findings are not supported by any evidence"an Appellate Court should not intrevene. *United States v. Fabric Garment Co.,* 262 F.2d 631, 642 (2d Cir. 1958); *United States v. Bracer,* 342 F.2d 522, 524 (2d Cir. 1965); *United States v. Boston,* 508 F.2d 1171, 1179 (2d Cir. 1974); *United States v. Bronstein,* 521 F.2d 459, 463 (2d Cir. 1975). In that decision (15A-21A) the Court found each of the numerated items of evidence admissible, ruling that no taint resulted from the initial unlawful search and further ruling that the Government fully met its burden of demonstrating that the oral admission, the written confession and the consents to search were voluntarily given.

The appellant claims that the items of evidence enumerated herein would not have been discovered "but for" the initial illegality; *i.e.,* the unlawful search of Mullens' residence. And that, therefore, the evidence is "tainted" because there has been no intervening independent investigation to develop that evidence. That aside, he further claims that the fruits of the search of 25 Wakefield Avenue (aluminum plates used in the production of counterfeit) and 1361 Fillmore Avenue (printing press and other counterfeiting paraphernalia) should have been suppressed because the consent to search for each was not voluntarily given, but rather was coerced. He claims the coercion is attributable to the parents' unlawful detention and by the police wrongfully playing upon his concern for his loved ones. These arguments do not hold water.

While we are dealing with both Fourth and Fifth Amendment problems, this writer chooses to discuss them jointly rather than separately because the volunteered admission, the giving of full *Miranda* warnings and the knowing waiver of his right not to allow a search except upon warrant also serve as independent acts sufficient to break any causal chain which may exist between the primary illegality of the first search and the evidence obtained as a result of the second and third searches. *Wickline v. Slayton*, 356 F.Supp. 140 (E.D.Va. 1973); *United States v. Fike*, 449 F.2d 191 (5th Cir. 1971).

Certainly the "fruit of the poisonous tree" doctrine serves to exclude from evidence not only the direct product (here, the $10,410 in counterfeit $10 and $20 Federal Reserve Notes found in the possession of Mullens' mother) but also the indirect products of such illegal invasion. *Wong Sun v. United States*, 371 U.S. 471 (1963). However, not all evidence is "fruit of the poisonous tree" requiring exclusion merely because it would not have been discovered "but for" the primary illegal invasion. The determination as to whether information gained by the policy in an illegal search was used to obtain other evidence against the accused is not based upon whether the subsequent evidence would not have come to light but for the illegal actions of the police, but rather upon "whether, granting establishment of the primary illegality, the evidence to which [the] objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun, supra*, at 487-488.

In determining whether the evidence in the instant case has been come at by exploiting that initial illegality as opposed to means sufficiently distinguishable so that the primary taint is purged, at least two exceptions to the *Silverthorne* doctrine have developed. The first is the attenuated circumstance doctrine set forth in *Nardone v. United States*, 308 U.S. 338 (1939).

The other is the independent source limitation. *Silverthorne Lumber Company v. United States,* 251 U.S. 385 (1920).

The reason for the exceptions to the rule is because the primary purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizure. "Because the primary purpose of the exclusionary rule is deterence 'the critical question when dealing with attenuation should be whether the admissibility of the challenged evidence will create an incentive for illicit police activity in the future'." *United States v. Houltin,* 525 F.2d 943 (5th Cir. 1976); *United States v. Calandra,* 414 U.S. 338, 347-348 (1974). There can be no showing here that exclusion of the four items of evidence would deter future unlawful police conduct. There has been no unlawful conduct. The police, based upon informant information, made application for and obtained a warrant so that the police were on the premises with judicial approval. See *People v. Dentine,* 27 A.D. 2d 139, *aff'd.* 21 N.Y. 2d 700 (1967).

The question is whether there is a strong nexus or relationship between the initial illegality and any subsequent confession or evidence obtained as a result of subsequent searches. The nexus can only be shown where the decision to speak or consent to search is significantly affected by the prior constitutional error. Here, the decision to speak, if at all, was out of concern for the defendant's parents who, it is submitted, were legally in custody at the time. Where the statement is given voluntarily and without unlawful coercion the nexus is then so attenuated as to dissipate the taint. *Wong Sun, supra.* Another way of putting it is to say that the voluntary actions of Mullens are sufficient independent acts to break the casual connection between the primary illegality and the evidence obtained. See *United States ex rel. LaBelle v. LaValle,* 517 F.2d 750 (2d Cir. 1975); *United States v. Fike,*

supra. Therefore, where, as here, an admission or confession or consent to search is freely and voluntarily given without coercion, either physical or psychological, it is purged of any stigma of illegality and is admissible. *Wong Sun, supra.*

One of the independent acts severing the causal chain and dissipating the taint was the lawful detention of Mullens' parents. While Buffalo Police officers were on the premises of Mullens' home pursuant to a warrant later held to be defective, they nevertheless were there with initial judicial approval. *People v. Dentine, supra.* Once there, the arrest of Mullens' parents was nonetheless lawful because it was supported by probable cause independent of the defective warrant. *LaBelle, supra,* at 753. As the testimony showed and as Judge Curtin found (11-15, 9A), Policewoman Mary Knobloch found Mullens' mother with a bag full of counterfeit $10 and $20 Federal Reserve Notes. Since the New York Criminal Procedure Law, Section 140.10(a) gives a police officer authority to arrest a person where he has reasonable cause to believe that such person has committed a crime in his presence and since possession of counterfeit currency is a violation of Title 18, United States Code, Section 472, the arrest of Mr. & Mrs. Mullens was lawful.

Mullens' appearance at Buffalo Police Headquarters was occasioned by his parents' legal detention. He was never confronted with the fruits of the unlawful search of his home. Indeed, his claim is that his decision to speak was occasioned by his parents' detention and his concern for their well being (Appellant's brief, pp. 12-13).

Before any questioning by police, Mullens volunteered that he was the one who "did it" (18, 53-54). He was then immediately advised of his *Miranda* rights, both orally and in writing. He said he understood his rights and was willing to

waive them. He then admitted his role in the counterfeiting scheme (Gov. Ex. 3, 29-30, 53-54). So that, before there could possibly be any coercion, Mullens volunteered his complicity. Moreover, he was given full *Miranda* warnings which removes any coercion to speak. See *Wickline, supra.* at 143.

Nor was his decision to speak subsequent to the giving of *Miranda* warnings due in any part to the police threatening the prosecution of his parents or playing upon his emotional attachment to his parents. As the record amply demonstrates, Mullens was the one who was "doing all the dealing. . .He is the one that brought it [lack of prosecution of his parents] all up" (119). Under these circumstances, such an admission or confession is not rendered involuntary or invalid. See *Wickline, supra; Young v. Warden,* 383 F.Supp. 986, 991-994 (D.Md. 1974); *United States v. Brandon,* 467 F.2d 1008 (9th Cir. 1972); *Voght v. United States,* 156 F.2d 308 (5th Cir. 1946); *United States v. McShane,* 462 F.2d 5, 6 (9th Cir. 1972). As the Court observed in *Wickline,* at 143-144: "Wickline was simply trying to exculpate his brother-in-law and this was the impetus for his statement." Similarly in *Voght, supra,* at 312, the Court said that: "The fact that an accused undertakes to shoulder the entire burden in order to exculpate someone, does not, in itself, render his confession involuntary and invalid." In other words, the police never ". . .utilized or took improper advantage of whatever concern the defendant may have had for his [parents] to extract from him an involuntary statement. . ." *People v. Graham,* 27 A.D. 2d 203, 277 N.Y.S. 2d 943, 945 (1967).

Nowhere does the appellant claim that he was never given proper *Miranda* warnings or that he did not understand them or did not waive them. Indeed, he cannot. Similarly, with respect to the later written confession (Gov. Ex. 10), there is no claim that proper *Miranda* warnings were not given or that Mullens did not understand or did not waive them.

With respect to the search of 25 Wakefield and 1361 Fillmore Avenues, a consent to search has been repeatedly recognized as sufficient to waive Fourth Amendment rights. *Katz v. United States*, 389 U.S. 347 (1967). The District Judge found that the Government sustained its burden of proving that consent was obtained freely and voluntarily and should not be overturned by this Court. *United States v. Miley*, 513 F.2d 1191, 1201 (2d Cir. 1975), and cases cited therein. As Detective Hunter testified, he explained to Mullens that by signing the consent to search form (Gov. Ex. 4) he was giving the police the right to search without the necessity of obtaining a search warrant. Hunter went on to say that Mullens told him that he knew what he was doing at the time he signed. Based upon Hunter's acquaintance with him over a period of twenty years, he further testified that: "He is very knowledgeable about the law. He is no dummy" (29).

As another indication of the voluntariness of his actions, Mullens volunteered to take the officers to the Fillmore Avenue address. As Hunter testified, "It was his suggestion and his cooperation to take us" (21).

The first knowledge Hunter and Zona had of the Wakefield address came about when, while on the way to the Fillmore Avenue address, Mullens said: "We have got to go to Wakefield Street first" (101). There Mullens retrieved the plates and gave them to Hunter (21-22, 102). In fact no search or seizure took place here, at least not by the police. As indicated, it was Mullens who obtained and surrendered the plates. Mullens also directed the officers to the Fillmore Avenue address and assisted them by showing them the various locations where burned counterfeit currency existed and led them up the stairs and opened the door and pointed out the printing press to them (25-28). Such a high degree of assistance is a strong indication of consent. See *United States v. Rivera*, 321 F.2d 704, 709 (2d Cir. 1963). This consent is suf-

ficient to break any casual chain between the primary illegality and the evidence obtained as a result of the second and third search. See *United States v. Fike, supra,* at 194.

Clearly then, any connection between the initial unlawful search of 1536 Jefferson Avenue and the subsequent oral admission, written confession and physical evidence obtained from 25 Wakefield Avenue and 1361 Fillmore Avenue has "become so attenuated as to dissipate the taint." *Nardone v. U S., supra,* at 341.

Conclusion.

The district court's ruling that the evidence sought to be used is admissible was based upon his finding of the absence of the use of coercive tactics and the presence of significant intervening occurrences between the unlawful search and the acquisition of the evidence. The judgment of conviction flowing from the Appellant's guilty plea resulting from that ruling should, in all respects, be affirmed.

Respectfully submitted,

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State of New York)
County of Genesee) ss.:
City of Batavia)

RE: U. S. A.
v
Greene Berry Mullens
Docket No. 751436

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 11 day of March, 1976 I mailed 2 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to:

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Leslie R. Johnson

Sworn to before me this

11 day of March, 1976

Patricia A. Lacey

PATRICIA A. LACEY
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My Commission Expires March 30, 19 77